

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
RENO, NEVADA

CYNTHIA F. ROBERTS,	)	3:10-cv-00025-ECR-VPC
	)	
Plaintiff,	)	<u>Order</u>
	)	
vs.	)	
	)	
FIRST HORIZON HOME LOAN	)	
CORPORATION; LANDAMERICA ONESTOP,	)	
INC.; METLIFE HOME LOANS, a	)	
division of METLIFE BANK, N.A.;	)	
COUNTRYWIDE HOME LOANS, INC., a	)	
New York corporation; BANK OF	)	
AMERICA CORPORATION, N.A.; JOHN	)	
ROUSSEL, individually; MERSCORP,	)	
INC., a Virginia corporation;	)	
MORTGAGE ELECTRONIC REGISTRATION	)	
SYSTEMS, INC., a subsidiary of	)	
MERSCORP, INC., a Delaware	)	
corporation; and DOES 1-25	)	
CORPORATIONS; DOES and ROES 1-25	)	
individuals, [Partnerships, or	)	
anyone claiming any interest to	)	
the property,	)	
	)	
Defendants.	)	
	)	
	)	

Plaintiff is a homeowner who alleges that she is the victim of a predatory lending scheme perpetrated by Defendants. Now pending are Plaintiff's Motion to Certify State Law Question to the Nevada Supreme Court (#53); a Motion to Dismiss (#54) filed by Defendant MetLife Bank, N.A. ("MetLife"); a Motion to Dismiss (#55) filed by Defendants Bank of America, N.A. ("Bank of America"), Countrywide Home Loans, Inc. ("Countrywide"), First Horizon Home Loan

1 Corporation ("First Horizon"), and John Roussel; and Plaintiff's  
2 Motion for Leave to File Amended Complaint (#66).

3 **I. Background**

4 On or about November 30, 2005, Plaintiff Cynthia F. Roberts  
5 purchased the property located at 596 Ranch Road, Fernley, Nevada  
6 89408 with a first and second loan from Defendant First Horizon.  
7 (Compl. ¶ 28 (#1 Ex. A).) Plaintiff refinanced the second loan with  
8 a new loan and second deed of trust from Countrywide on February 23,  
9 2007. (Id. ¶ 24.) On June 30, 2009, Defendant LandAmerica OneStop,  
10 Inc. ("LandAmerica") recorded a notice of default with respect to  
11 the first loan. (Id. ¶ 58.) The notice of trustee's sale with  
12 respect to the first deed of trust on the property was recorded on  
13 October 12, 2009, scheduling the sale for October 23, 2009. (Id.)  
14 Plaintiff has no documents verifying that the sale was ever  
15 completed. (Id.) It further appears that no notice of default or  
16 any other foreclosure notices relating to Countrywide's second deed  
17 of trust have been recorded.

18 On November 23, 2009, Plaintiff filed a Complaint (#1 Ex. A) in  
19 the Third Judicial District Court of the State of Nevada in and for  
20 the County of Lyon alleging the following fourteen claims for  
21 relief: (1) Violation of Unfair Lending Practices, N.R.S. §  
22 598D.100; (2) Conspiracy to Commit Fraud and Conversion; (3)  
23 Permanent Injunction; (4) Declaratory Relief; (5) Wrongful  
24 Foreclosure; (6) Fraud Through Omission; (7) Quiet Title; (8)  
25 Contractual Breach of the Duty of Good Faith and Fair Dealing; (9)  
26 Tortuous [sic] Breach of the Duty of Good Faith and Fair Dealing;  
27 (10) Civil Conspiracy; (11) Racketeering (NRS 207.470); (12) Unjust

1 Enrichment; (13) Conspiracy to Commit Fraud Related to MERS System;  
2 and (14) Fraud in the Inducement. In connection with the Complaint,  
3 Plaintiff recorded a lis pendens on the property.

4 On March 26, 2010, all of Plaintiff's claims related to the  
5 formation and/or operation of the MERS system were transferred to  
6 the MERS Multidistrict Litigation Court (the "MDL court"). On March  
7 21, 2011, the MDL Court issued an order (#49) clarifying that the  
8 parts of Plaintiff's claims 1, 3, 4, and 10-12 unrelated to the  
9 formation and/or operation of MERS were remanded to this Court.

10 On April 4, 2011, Plaintiff filed a Motion to Certify State Law  
11 Question to the Nevada Supreme Court (#53). On April 26 and April  
12 28, 2011, Defendants responded (##61, 63).

13 On April 5, 2011, Defendants filed their Motions to Dismiss  
14 (##54, 55). Plaintiff responded (#59) on April 24, 2011.  
15 Defendants replied (##64, 65) on May 4, 2011.

16 Plaintiff filed a Motion for Leave to File an Amended Complaint  
17 (#66) on May 7, 2011. Defendant MetLife responded (#72) on June 1,  
18 2011, and Defendants Bank of America, Countrywide, First Horizon,  
19 and John Roussel responded (#75) on June 6, 2011. Plaintiff replied  
20 (#76) on June 16, 2011.

21

22 **II. Plaintiff's Motion for Leave to File an Amended Complaint (#66)**

23 **A. Legal Standard**

24 Pursuant to Federal Rule of Civil Procedure 15(a), leave to  
25 amend is to be "freely given when justice so requires." In general,  
26 amendment should be allowed with "extreme liberality." Owens v.  
27 Kaiser Found. Health Plan, Inc., 244 F.3d 708 712 (9th Cir. 2001)

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1 (quoting Morongo Band of Missions Indians v. Rose, 893 F.2d 1074,  
2 1079 (9th Cir. 1990)). However, if factors such as undue delay, bad  
3 faith, dilatory motive, undue prejudice, or futility of amendment  
4 are present, leave to amend may properly be denied in the district  
5 court's discretion. Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d  
6 1048, 1051-52 (9th Cir. 2003). The futility analysis determines  
7 whether the proposed amendment would survive a motion to dismiss  
8 pursuant to Rule 12(b)(6). Miller v. Rykoff-Sexton, Inc., 845 F.2d  
9 209, 214 (9th Cir. 1988).

#### 10 **B. Discussion**

11 Plaintiff's proposed amended complaint (#66 Ex. 1) alleges the  
12 following nine causes of action: (1) Debt Collection Violations; (2)  
13 Violation of Unfair and Deceptive Trade Practices Act; (3) Violation  
14 of Unfair Lending Practices, N.R.S. 598D.100; (4) Violation of the  
15 Covenant of Good Faith and Fair Dealing; (5) Violation of NRS  
16 107.080 et seq.; (6) Quiet Title Action; (7) Fraud in the Inducement  
17 and Through Omission; (8) Slander of Title; (9) Abuse of Process.

18 At the outset, the Court notes that many of the claims in the  
19 proposed amended complaint are already present in the original  
20 complaint. For this reason, amendment is not necessary to include  
21 Plaintiff's third through seventh causes of action. Accordingly,  
22 the Court denies leave to amend to add those claims. The Court now  
23 addresses the first, second, eighth, and ninth claims in the  
24 proposed amended complaint in turn.

##### 25 1. Debt Collection Violations

26 Granting Plaintiff leave to plead an additional claim for  
27 unauthorized debt collection would prove futile. Liability under  
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Chapter 649 of the Nevada Revised Statutes ("NRS") is premised on liability under the federal Fair Debt Collection Practices Act ("FDCPA"). NEV. REV. STAT. § 649.370. At the threshold of such a claim, Plaintiff must establish that Defendants are debt collectors within the meaning of the FDCPA. However, the FDCPA's definition of "debt collector" does not "include the consumer's creditors, a mortgage servicing company, or any assignee of the debt, so long as the debt was not in default at the time it was assigned." Croce v. Trinity Mortg. Assur. Corp., No. 2:08-CV-01612, 2009 WL 3172110, at \*2 (D. Nev. Sept. 28, 2009) (citing S. Rep. No. 950382, at 3 (1977)). Furthermore, foreclosure pursuant to a deed of trust does not constitute debt collection under the FDCPA. Fitzgerald v. Clarion Mortg. Capital, No. 3:10-cv-766, 2011 WL 2633502, at \*5 (D. Nev. July 5, 2011) (citing Camacho-Villa v. Great W. Home Loans, No. 3:10-cv-210, 2011 WL 1103681, at \*4 (D. Nev. Mar. 23, 2011)); see also Izenberg v. ETS Servs., LLC, 589 F. Supp. 2d 1193 (C.D. Cal. 2008); Hulse v. Ocwen Fed. Bank, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002). For these reasons, the FDCPA and the corresponding Nevada debt collection statutes do not apply to Defendants. Plaintiff will therefore be denied the opportunity to include a claim for unauthorized debt collection due to futility.

## 2. Violation of Unfair and Deceptive Trade Practices Act

Plaintiff's proposed second claim for relief pursuant to NRS § 598.0923 also fails. Under the statute, a person engages in deceptive trade practices when, in the course of his or her business or occupation, he or she knowingly conducts the business or occupation without all required state, county, or city licenses.

1 However, the statutes explicitly state that the following activities  
2 do not constitute "doing business" in the State of Nevada: (1)  
3 maintaining, defending or settling any proceeding; (2) creating or  
4 acquiring indebtedness, mortgages, and security interests in real or  
5 personal property; and (3) securing or collecting debts or enforcing  
6 mortgages and security interests in property securing the debts.  
7 NEV. REV. STAT. § 80.015(1)(a), (g)-(h). Because Defendants are  
8 explicitly exempt from acquiring licenses in this mortgage case,  
9 Plaintiff will be denied leave to amend due to futility.

### 10 3. Slander of Title

11 As her eighth claim for relief in the proposed amended  
12 complaint, Plaintiff alleges that Defendants slandered Plaintiff's  
13 title by recording the notice of default under the first deed of  
14 trust. To succeed on a slander of title claim, the plaintiff must  
15 show "false and malicious communications, disparaging to one's title  
16 in land, and causing special damages." Exec. Mgmt., Ltd. v. Ticor  
17 Title Co., 963 P.2d 465, 478 (Nev. 1998). However, Plaintiff has  
18 failed to state a claim because it is undisputed that Plaintiff is  
19 in default. See Sexton v. IndyMac Bank FSB, No. 3:11-cv-437, 2011  
20 WL 4809640, at \*5 (D. Nev. Oct. 7, 2011) ("Plaintiffs have failed to  
21 state a claim because it is undisputed that Plaintiffs are in  
22 default."); Ramos v. Mortg. Elec. Registrations Sys., Inc., No.  
23 2:08-CV-1089, 2009 WL 5651132, at \*4 (D. Nev. Mar. 5, 2009)  
24 (dismissing slander of title claim where Plaintiffs failed to  
25 dispute that they were in default on their loan, nor was it false  
26 that the property was to be sold at a trustee's sale). In filing  
27 the notice of default, Defendants stated that Plaintiffs were in  
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breach of the loan agreement due to nonpayment. (Defs.' Mot. Dismiss (#55) Ex. K.)<sup>1</sup> Again, Plaintiff does not dispute that she is in fact in default. Because the statement is not false, Defendants cannot be liable for slander of title. Leave to amend to include a slander of title claim will therefore be denied as futile.

#### 4. Abuse of Process

Amendment to include Plaintiff's proposed additional claim for abuse of process would prove futile because non-judicial foreclosure is not the type of "process" addressed by the abuse of process tort because it does not involve judicial action. Riley v. Greenpoint Mortg. Funding, Inc., No. 2:10-cv-1873, 2011 WL 1979831 at \*5 (D. Nev. May 20, 2011); see also Barlow v. BNC Mortg., Inc., No. 3:11-CV-0304, 2011 WL 4402955 at \*4 (D. Nev. Sept. 21, 2011) ("[T]he process at issue in this action is a non-judicial foreclosure which is not the characteristic legal action contemplated by an abuse of process claim . . . Therefore, the court finds that [Plaintiff] has failed to state a claim for abuse of process.") (citation omitted). Accordingly, the Court finds that amendment to add a claim for abuse of process would be futile.

Plaintiff's Motion (#66) must therefore be denied in its entirety. Amendment is not necessary to include a number of Plaintiff's claims because they appear in the original complaint. Amendment to allow the other proposed claims would prove futile for the reasons stated above. Having resolved Plaintiff's Motion for

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<sup>1</sup> The Court takes judicial notice of the public records produced by Defendants pursuant to Federal Rule of Evidence 201.

1 Leave to File Amended Complaint (#66), the Court now turns to  
2 Defendants' motions (##54, 55) to dismiss the original complaint.

### 3 III. Defendants' Motions to Dismiss (##54, 55)

#### 4 A. Legal Standard

5 A motion to dismiss under Federal Rule of Civil Procedure  
6 12(b)(6) will only be granted if the complaint fails to "state a  
7 claim to relief that is plausible on its face." Bell Atl. Corp. v.  
8 Twombly, 550 U.S. 544, 570 (2007); see also Ashcroft v. Iqbal, 129  
9 S. Ct. 1937, 1953 (2009) (clarifying that Twombly applies to  
10 pleadings in "all civil actions"). On a motion to dismiss, except  
11 where a heightened pleading standard applies, "we presum[e] that  
12 general allegations embrace those specific facts that are necessary  
13 to support the claim." Lujan v. Defenders of Wildlife, 504 U.S.  
14 555, 561 (1992) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S.  
15 871, 889 (1990)) (alteration in original); see also Erickson v.  
16 Pardus, 551 U.S. 89, 93 (2007) ("Specific facts are not necessary;  
17 the statement need only give the defendant fair notice of what the .  
18 . . claim is and the grounds upon which it rests.") (internal  
19 quotation marks omitted). Moreover, "[a]ll allegations of material  
20 fact in the complaint are taken as true and construed in the light  
21 most favorable to the non-moving party." In re Stac Elecs. Sec.  
22 Litig., 89 F.3d 1399, 1403 (9th Cir. 1996) (citation omitted).

23 Although courts generally assume the facts alleged are true,  
24 courts do not "assume the truth of legal conclusions merely because  
25 they are cast in the form of factual allegations." W. Mining  
26 Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Accordingly,  
27



1 "[c]onclusory allegations and unwarranted inferences are  
2 insufficient to defeat a motion to dismiss." In re Stac Elecs., 89  
3 F.3d at 1403 (citation omitted).

4 Review on a motion pursuant to Rule 12(b)(6) is normally  
5 limited to the complaint itself. See Lee v. City of L.A., 250 F.3d  
6 668, 688 (9th Cir. 2001). If the district court relies on materials  
7 outside the pleadings in making its ruling, it must treat the motion  
8 to dismiss as one for summary judgment and give the non-moving party  
9 an opportunity to respond. FED. R. CIV. P. 12(d); see United States  
10 v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003). "A court may,  
11 however, consider certain materials – documents attached to the  
12 complaint, documents incorporated by reference in the complaint, or  
13 matters of judicial notice – without converting the motion to  
14 dismiss into a motion for summary judgment." Ritchie, 342 F.3d at  
15 908.

16 If documents are physically attached to the complaint, then a  
17 court may consider them if their "authenticity is not contested" and  
18 "the plaintiff's complaint necessarily relies on them." Lee, 250  
19 F.3d at 688 (citation, internal quotations, and ellipsis omitted).  
20 A court may also treat certain documents as incorporated by  
21 reference into the plaintiff's complaint if the complaint "refers  
22 extensively to the document or the document forms the basis of the  
23 plaintiff's claim." Ritchie, 342 F.3d at 908. Finally, if  
24 adjudicative facts or matters of public record meet the requirements  
25 of Federal Rule of Evidence 201, a court may judicially notice them  
26 in deciding a motion to dismiss. Id. at 909; see FED. R. EVID.  
27 201(b) ("A judicially noticed fact must be one not subject to  
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reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”).

#### **B. Discussion**

The Court again notes that Plaintiff’s second, fifth, sixth, seventh, eighth, ninth, thirteenth, and fourteenth claims for relief have been transferred to the MDL court. The Court now addresses the claims that remain within our jurisdiction, and only those parts unrelated to the formation and/or operation of MERS, per the MDL Court’s order (#49).

##### 1. Violation of Unfair Lending Practices, N.R.S. 598D.100

Plaintiff’s first cause of action against Defendants MERS and First Horizon for violation of Nevada’s Unfair Lending Practices Act is time-barred. The statute of limitations for “[a]n action upon a liability created by a statute” is three years. NEV. REV. STAT. § 11.190(3)(a). Plaintiff obtained the first and second loans in November 2005 and filed the complaint (#1 Ex. A) in November 2009. (Compl. ¶ 28 (#1 Ex. A).) Plaintiff’s claim for unfair lending practices is therefore untimely and must be dismissed.

##### 2. Civil Conspiracy

Plaintiff asserts a cause of action for civil conspiracy as her tenth claim for relief. Plaintiff alleges that Defendants entered into a conspiracy to eject Nevadans from their homes. (Compl. ¶ 110 (#1 Ex. A).) Plaintiff asserts in her response (#59) that she has abandoned her claim for civil conspiracy. (Pl.’s Opp’n Mot. Dismiss at 10 (#59).) In accord with Plaintiff’s affirmative abandonment

1 and Local Rule 7-2(d)<sup>2</sup>, the Court dismisses Plaintiff's claim for  
2 civil conspiracy.

3 In any event, the Court notes that Plaintiff has failed to  
4 state a claim for civil conspiracy upon which relief can be granted.  
5 To state a claim for civil conspiracy under Nevada law, a Plaintiff  
6 must allege (1) the commission of an underlying tort; and (2) an  
7 agreement between the defendants to commit that tort." Lalataq v.  
8 Money First Fin. Servs., Inc., No. 2:09-cv-02268, 2010 WL 2925875,  
9 at \*2 (D. Nev. July 20, 2010) (citing GES, Inc. v. Corbitt, 21 P.3d  
10 11, 15 (Nev. 2001)). Furthermore, a claim for civil conspiracy must  
11 be pled with particular specificity as to "the manner in which a  
12 defendant joined in the conspiracy and how he participated in it."  
13 Arroyo v. Wheat, 591 F. Supp. 141, 144 (D. Nev. 1984). Here,  
14 Plaintiff fails to plead either element of a civil conspiracy claim,  
15 let alone with particularity as to each Defendant's alleged  
16 participation. Plaintiff's claim must be dismissed.

### 17 3. Racketeering (NRS 207.470)

18 Like her claim for civil conspiracy, Plaintiff asserts in her  
19 opposition that she has abandoned her eleventh cause of action for  
20 racketeering. (Pl.'s Opp'n Mot. Dismiss at 10 (#59).) In accord  
21 with Plaintiff's affirmative abandonment and Local Rule 7-2(d), the  
22 Court dismisses Plaintiff's claim for racketeering. In any event,  
23 the Court finds that Plaintiff's complaint fails to state a claim  
24 for racketeering because a plaintiff must plead such a claim with  
25 specificity. Eastwood v. Lehman Bros. Bank, FSB, No. 3:09-cv-00656,

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26 <sup>2</sup> Local Rule 7-2(d) provides that "[t]he failure of an opposing  
27 party to file points and authorities in response to any motion shall  
28 constitute a consent to the granting of the motion."

2010 WL 2696479, at \*2 (D. Nev. July 2, 2010) (citing Asphalt Prods. Corp. v. All Star Ready Mix, 898 P.2d 699, 700 (Nev. 1995)). "That is, the complaint must allege at least two predicate crimes related to racketeering in order to sufficiently plead a racketeering claim upon which relief can be granted." Eastwood, 2010 WL 2696479, at \*2 (citing Asphalt Prods, 898 P.2d at 700). Here, Plaintiff merely alleges that "Defendants engaged in racketeering . . . via the predatory and abusive lending practices described herein, and the repeated failure to disclose such - both relative to Plaintiff and others." (Compl. ¶ 114 (#1 Ex. A).) Plaintiff's one conclusory allegation falls far short of what is required to state a claim for racketeering pursuant to Nevada law.

#### 4. Unjust Enrichment

In her twelfth claim for relief, Plaintiff asserts that "Defendants have been unjustly enriched by receiving payments on the risky, volatile mortgage loan which was designed to reap inordinate profits for Defendants and to ultimately fail." (Compl. ¶ 119 (#1 Ex. A).) However, Plaintiff has also affirmatively abandoned her claim for unjust enrichment. (Pl.'s Opp'n Mot. Dismiss at 10 (#59).) In accord with Plaintiff's affirmative abandonment and Local Rule 7-2(d), the Court dismisses Plaintiff's claim for unjust enrichment. In any event, Plaintiff's claim for unjust enrichment fails anyway because under Nevada law, there can be no action for unjust enrichment where there is an express, written contract. Leasepartners Corp. v. Robert L. Brooks Trust, 942 P.2d 182, 187 (Nev. 1997); see also Lipshie v. Tracy Inv. Co., 566 P.2d 819, 824 (Nev. 1977) ("To permit recovery by quasi-contract where a written

1 agreement exists would constitute a subversion of contractual  
2 principles." ). Plaintiff bases her claim for unjust enrichment on  
3 "the terms of the Note and Deed of Trust executed by Plaintiff" and  
4 "mortgage loan documents." (Compl. ¶¶ 117-18 (#1 Ex. A).) In other  
5 words, Plaintiff bases her claim for unjust enrichment on express,  
6 written contracts. Plaintiff's claim therefore fails as a matter of  
7 law.

#### 8 5. Permanent Injunction and Declaratory Relief

9 Plaintiff asserts claims for a permanent injunction and  
10 declaratory relief as her third and fourth claims for relief,  
11 respectively. However, injunctive and declaratory relief are  
12 remedies, not independent causes of action. In re Wal-Mart Wage &  
13 Hour Emp't Practices Litig., 490 F. Supp. 2d 1091, 1130 (D. Nev.  
14 2007). Both of these claims are derivative of Plaintiff's other  
15 substantive claims, which all fail. Accordingly, Plaintiff's third  
16 and fourth claims for relief must also be dismissed.

#### 17 IV. Plaintiff's Motion to Certify State Law Question to the Nevada 18 Supreme Court (#53)

19 Plaintiff has filed a motion (#53) pursuant to Nevada Rule of  
20 Appellate Procedure 5(a) to certify the following question of state  
21 law to the Nevada Supreme Court:

22 Under the Nevada nonjudicial foreclosure statute,<sup>3</sup> when a  
23 Notice of Default is recorded by a Trustee or other  
24 purported agent of the beneficiary *prior* to the recording  
25 of a document appointing that Trustee or purported agent,  
26 is the resulting foreclosure invalid so as to require at  
27 least one additional document to be recorded to correct  
28 the foreclosure process?

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27 <sup>3</sup> NRS 107.080, et seq.

(Pl.'s Mot. Certify at 2 (#53) (emphasis and footnote in original).)  
Nevada Rule of Appellate Procedure 5(a) provides that the Nevada Supreme Court may answer questions of law certified to it by a United States District Court if there are "questions of law of this state which may be determinative of the cause then pending . . . and as to which it appears to the certifying court there is no controlling precedent."

The Court finds that Plaintiff's question of state law is not determinative of any part of this case. Plaintiff's question is not at all relevant to the claims that remain within the jurisdiction of this court. Moreover, Plaintiff does not allege a violation of NRS § 107.080 anywhere in the Complaint (#1 Ex. A), not even in her claim for wrongful foreclosure, which remains with the MDL court. Accordingly, certification of Plaintiff's question will have no impact on this litigation. Certification is therefore inappropriate in this case and Plaintiff's Motion to Certify (#53) must be denied.

#### **V. Conclusion**

The Court has analyzed each of Plaintiff's claims that remain in our jurisdiction and found that they all must be dismissed. Furthermore, because the Court also denies Plaintiff's motion (#66) to amend the complaint for reasons of futility, Plaintiff will not be granted leave to amend, and Plaintiff's claims are dismissed with prejudice. Finally, the Court finds that certification of Plaintiff's question to the Nevada Supreme Court would be

1 inappropriate as the question is not determinative of any part of  
2 this case.

3 **IT IS, THEREFORE, HEREBY ORDERED** that Plaintiff's motion (#66)  
4 for leave to file amended complaint is **DENIED**.

5 **IT IS FURTHER ORDERED** that Defendant MetLife's motion (#54) to  
6 dismiss and Defendants' Bank of America, Countrywide, First Horizon,  
7 and John Roussel's motion (#55) to dismiss are **GRANTED**. All of  
8 Plaintiff's claims remaining within our jurisdiction are **DISMISSED**  
9 with prejudice.

10 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Certify State  
11 Law Question to the Nevada Supreme Court (#53) is **DENIED**.

12  
13  
14 DATED: October 19, 2011.

15   
16 UNITED STATES DISTRICT JUDGE